United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-2135

To be argued by
RICHARD WEINBERG

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-2135

WILLIE ABRAHAM, ERROLL HOLDER, ROBERT HOKE and WALTER GRANT,
Petitioners-Appellants,

—v.—

UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

RICHARD WEINBERG,
FREDERICK T. DAVIS,
Assistant United States Attorneys, Of Counsel.

TABLE OF CONTENTS

TABLE OF CASES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-2135

WILLIE ABRAHAM, ERROLL HOLDER,
ROBERT HOKE and WALTER GRANT,
Petitioners-Appellants,

—v.—

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Willie Abraham, Erroll Holder, Walter Grant, and Robert Hoke appeal from an order entered on September 13, 1976, in the United States District Court for the Southern District of New York by the Honorable Dudley B. Bonsal, United States District Judge, denying after a hearing petitioners' motions pursuant to Title 28, United States Code, Section 2255, to vacate their sentences and to grant a new trial.

On October 16, 1972, Indictment 72 Cr. 1159 was filed, charging each petitioner and fourteen other defendants with violations of the federal narcotic laws. A jury trial began before United States District Judge Frederick Van Pelt Bryan on January 16, 1973, and

on February 23, 1973, the petitioners were found guilty of violating various provisions of the narcotic laws. On June 26, 1973, each petitioner was sentenced by Judge Bryan.* Following the trial, Judge Bryan permitted the petitioners and co-defendants to seek suppression of evidence on grounds not advanced until the trial had begun. *United States* v. *Sisca*, 361 F. Supp. 735 (S.D.N.Y. 1973). Each petitioner's conviction was affirmed by this Court on May 10, 1974. *United States* v. *Sisca*, 503 F.2d 1337 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974).

On March 1, 1976, the petitioner Abraham filed a petition pursuant to Title 28, United States Code, Section 2255, seeking to vacate his sentence and to obtain a new trial. Petitioner Holder filed a similar petitioner seeking the identical relief. The District Court ordered an evidentiary hearing on the issues raised by petitioners Abraham and Holder, which hearing was held on May 25, 1976. On June 14, 1976, petitioners Hoke and Grant filed similar motions to vacate their sentences. The District Court found that the evidence produced at the May 25, 1976, hearing was applicable to the issues raised by Hoke and Grant, and Judge Bonsal thus considered all four motions together. On September 13, 1976, the District Court in a written opinion denied the motion of each petitioner to vacate his sentence and to grant a new trial.

---

* Abraham was sentenced to a fifteen-year term of imprisonment on Count One, a consecutive four-year term of imprisonment on Count Three, both of which were concurrent to a life term of imprisonment on Count Two. Grant and Holder received consecutive sentences of fifteen years on Count One and four years on Count Three. Hoke received a fifteen-year term of imprisonment on Count One.

Statement of Facts

Indictment 72 Cr. 1159 filed on October 16, 1972, charged the petitioners and fourteen other defendants with violations of the Federal narcotics laws. Six of the defendants, including the four petitioners, were jointly represented by the law firm of Lenefsky, Gallina, Mass, Berne and Hoffman. Because of the apparent conflict of interest caused by the joint representation and at the specific request of the Government, Judge Bryan conducted a hearing on November 22, 1972.

Judge Bryan began the proceedings on November 22, 1972, by "cautioning the six defendants to pay very close attention to what is said this morning because it may vitally affect their interests in this case." (Tr. 3).* At the hearing Gino Gallina, Esq., represented each of the six defendants. While his clients, including the petitioners, were present, Mr. Gallina stated to the Court that he had informed the petitioners of a possible conflict of interest between one defendant and another. (Tr. 6).

An Assistant United States Attorney presented the Government's position that a conflict of interest was likely to develop among and between the six defendants represented by the same law firm, and that the Court could not rely simply on Mr. Gallina's assertion relating to the conflict of interest problem. (Tr. 8-12). Judge Bryan stated that the Court would talk to each defendant individually in order to resolve the joint representation question. (Tr. 11). At this juncture Mr. Gallina stated that he had discussed this point with his clients, and that he was willing to leave the courtroom and permit the District Court to

---

* Tr., refers to the transcript of the November 22, 1972 conflict of interest hearing.

question each defendant in his absence. (Tr. 13). Mr. Gallina also agreed to permit another attorney, Murray Mogel, Esq., of the Legal Aid Society, to advise the defendants on the joint representation problem. (Tr. 13). Mr. Gallina reiterated his willingness to have the District Court appoint counsel to advise the defendants on the conflict of interest problem. (Tr. 22). Indeed, Mr. Gallina offered on a third occasion to leave the courtroom while the District Court interrogated each defendant. (Tr. 22).

Judge Bryan proceeded to address each defendant including the petitioners Abraham, Holder, Grant and Hoke. During the November 22, 1972, joint representation hearing, Judge Bryan individually interrogated each defendant on four separate occasions to insure that each defendant was knowingly waiving his right to be represented by an attorney who did not also represent a co-defendant. Judge Bryan initially questioned the defendant Alphonse Sisca. The hearing transcript reveals the following exchange:

> By the Court:
>
> Q. Now, Mr. Sisca, you are a defendant here on this indictment.
>
> A. Yes.
>
> Q. And you know what you are charged with.
>
> A. Yes, sir, your Honor.
>
> Q. You are charged with various violations of the narcotics laws and conspiracy to violate the narcotics laws in conjunction with a number of other people.
>
> Do you understand that?
>
> A. Yes, sir.

Q. I have got to tell you, Mr. Sisca, that it is sometimes very difficult indeed for a counsel who represents more than one defendant to take a position or to try a case or to ask questions which may hurt one defendant and not hurt the other which may be prejudicial to one defendant—do you follow me?

A. Yes.

Q. — because of his concern with the other defendants. I am not casting any aspersion—don't misunderstand me — on Mr. Gallina's honesty or good faith. I am only saying to you that this is a dangerous thing from the standpoint of the individual's rights. You have a perfect right to have any counsel of your own choosing, but you have got to select him with full understanding of the possibilities that may develop.

You heard, for instance, what Mr. McDonald said, the United States Attorney, did you not?

A. Yes.

Q. You heard him outline something about what may be the proof in this case, what the Government may try to offer. Do you understand the dangers of a conflict of interest here fully?

A. Yes, Your Honor.

Q. And you have considered the whole question of whether you wish to continue with a lawyer who represents a number of other defendants whose interests may specifically or generally be in conflict with your own?

A. Yes, Your Honor.

Q. What is your decision on that, sir?

A. That I intend to keep Mr. Gallina as my attorney.

Q. With the other defendants?

A. Yes.

Q. All right, you may sit down for the moment and we will discuss it a little further.

A. Thank you. (Tr. 22-24).

Immediately following this exchange with the defendant Sisca, Judge Bryan questioned the defendants Abraham, Holder, Hoke and Grant:

The Court: Next, Mr. Willie Abraham.

By the Court:

Q. Mr. Abraham, I'm sure by now you understand the nature of the charges against you.

You are charged with conspiracy to violate the narcotics laws and violation of the narcotics laws and also, in a separate count, with the very serious offense of having engaged in massive activities of this nature in interstate commerce which might subject you, if you were convicted, to a sentence of life imprisonment.

Do you understand that?

A. Yes.

Q. Now, you heard what I said to Mr. Sisca, did you not?

A. Yes, sir.

Q. I don't think it is necessary to repeat to you everything I said to Mr. Sisca, except to say to you that there is this possibility of a conflict of interest.

There is the possibility of a situation developing during the trial in which the best protection of

your interests may be different from the protection of the interests of one or more of your co-defendants who is represented by the same counsel.

Do you understand that?

A. Yes, sir.

Q. And you, as I say, have the absolute right to have counsel of your own choosing. Do you understand that?

A. Yes.

Q. But, on the other hand, you are entitled to separate and individual counsel if you want it. If you don't want it, you can only have the Gallina firm representing you, and the other defendants if you are fully cognizant, and you are fully aware of the possibilities of conflict of interest, and you of your own free choice and will decide to continue with them. Do you understand that?

A. Yes.

Q. With that in mind, what is your desire?

A. I would like to keep Mr. Gallina.

Q. You want to keep the Gallina firm?

A. Yes.

Q. Despite the fact that they may be representing other co-defendants and a conflict of interest may develop?

A. Yes, sir.

The Court: All right, you may sit down, Mr. Abraham, for the moment.

Mr. Erroll Holder.

By the Court:

Q. Mr. Holder, you understand the nature of the charges against you? You are charged with conspiracy to violate the narcotics laws and various violations of those laws?

A. Yes, I do.

Q. And you are charged on the conspiracy count with all the defendants who are here this morning and other people engaging in a conspiracy to violate the narcotics laws. Do you understand that?

A. Yes, I do.

Q. You heard what I have said both to Mr. Sisca and Mr. Abraham, have you not?

A. Yes.

Q. You understand, do you not, that if you are represented by the same lawyers that represent the other defendants who are here this morning there is at least a possibility and perhaps even a probability that conflict of interest will develop and that your interests on the trial may be different from the interests of some of your co-defendants and that it might be that counsel is forced to take a position which is more favorable to another defendant than it is to you. Do you understand that?

A. Yes, I do.

Q. And considering what I have just said to you now, what I have said to Mr. Sisca and what I have said to Mr. Abraham, is it your firm election and desire in view of all these facts to continue with the Gallina firm as representing you?

A. Yes, it is.

The Court: You may sit down for the moment, Mr. Holder.

Mr. Walter Grant.

Q. Mr. Grant, you have heard all the proceedings that went on this morning, everything that has been said in this courtroom, I take it?

A. Yes, sir.

Q. And you understand the nature of the charges against you; you understand you are charged with conspiracy with a number of other people, including the defendants in this room, to violate the narcotics laws and also with actual violations of the narcotics laws; do you understand that?

A. Yes.

Q. Are you fully aware that if you continue to have the Gallina firm represent you there are the possibilities, perhaps the probabilities of the conflict of interest situations we have been talking about this morning developing, do you understand that?

A. Yes.

Q. Do you understand that at some point or points during the course of the proceedings the Gallina firm may be in a position where they have to do something that would help one other defendant and perhaps hurt you somewhat; do you understand that?

A. Yes, Your Honor.

The Court: Do you understand that thoroughly?

A. Yes, Your Honor.

Q. Considering all that I have said to Mr. Sisca, Mr. Abraham and Mr. Holder and what has been said this morning, what is your desire with respect to counsel? You are entitled to counsel of your choosing. You are entitled to separate counsel that is, to change your counsel and have separate counsel representing you. What is your desire?

A. My desire is to stay with Mr. Gallina.

Q. And you have made the selection deliberately and of free choice and of your own free will; is that right?

A. Without a doubt.

The Court: You may sit down.

Mr. Robert Hoke.

By the Court:

Q. Mr. Hoke, you have heard everything that went on in the courtroom this morning, have you not?

A. Yes.

Q. Do you understand the nature of the charges against you? You are charged with conspiracy to violate the narcotics laws with these defendants in the courtroom and other defendants; do you understand that?

A. Yes.

Q. And also with violations of the narcotics laws?

A. Yes.

Q. Mr. Hoke, you have listened to everything that went on in the courtroom this morning, and

what I have said to Messrs. Sisca, Abraham, Holder and Grant. You understand, I take it, that if you continue to be represented by Mr. Gallina's firm there are these possibilities, if not probabilities, of conflict of interest?

A. I fully understand.

Q. You understand that fully?

A. Yes.

Q. And you understand there may come a time possibly or perhaps even probably the Gallina firm with all good faith would have to take a position that may be unfavorable to you, may prejudice you and favor one of the other defendants they represent; do you understand that?

A. I understand.

Q. As I said to these other gentlemen, you are fully entitled to counsel of your own choice. You are entitled to counsel representing you alone, if you wish.

Faced with the choice and the possibility of conflict of interest, what do you wish to do?

A. I would like to stay with Mr. Gallina.

Q. You want to stay with the Gallina firm?

A. Right.

Q. You are doing this of your own free will, and there haven't been any threats or promises or anything made to you that induced you other than your own best judgment that the thing should be handled this way?

A. That is right. (Tr. 24-31).

After the questioning of Hoke, the following question and answer occurred:

> The Court: With reference to Messrs. Sisca, Abraham, Holder and Grant, will each of you answer this question: Gentlemen, have any threats or pressures been put on you to stay with Mr. Gallina's firm?
>
> Defendant Sisca: No.
>
> Defendant Abraham: No.
>
> Defendant Holder: No.
>
> Defendant Grant: No. (Tr. 31).*

After a recess the hearing was resumed, and Judge Bryan addressed the defendants individually for a third time. The questioning relating to the petitioners' physical health was as follows:

> The Court: Will all of the six defendants in the courtroom rise at this point? I am addressing this question to each one of you, and I want an individual answer from each of you starting with Mr. Sisca.
>
> Mr. Sisca, is your mind quite clear this morning?

---

* Following the questioning of each petitioner by the District Judge, Judge Bryan conducted a similar interrogation of the other co-defendant who was represented by the same law firm which represented the petitioners. (Tr. 31-33). During the individual questioning of each defendant, the other petitioners were present in the courtroom, and presumably could hear the questions asked by Judge Bryan. Thus not only did each petitioner have the benefit of Judge Bryan's individual interrogation, but he also heard the District Court explain the dangers of joint representation separately to each of five co-defendants.

Defendant Sisca: Yes, sir.

The Court: Do you take drugs or have you at any point?

Defendant Sisca: No, your Honor.

The Court: And you are feeling physically all right?

Defendant Sisca: Yes sir.

The Court: And your mind is quite clear?

Defendant Sisca: Yes sir.

Defendant Abraham: Yes, sir.

The Court: Do you take drugs at any point?

Defendant Abraham: No.

The Court: Is your mind quite clear this morning? You are feeling physically all right?

Defendant Abraham: Yes sir.

The Court: The same question to Mr. Holder.

Defendant Holder: Yes, sir.

The Court: With the same answer?

Defendant Holder: Yes, sir.

The Court: I ask the same question of Mr. Abraham.

The Court: The same question to Mr. Grant.

Defendant Grant: Yes, sir, Your Honor.

The Court: Is that your answer to the question or what is your answer to the question?

Defendant Holder: Yes, your Honor, that is my answer to the question.

The Court: Your mind is quite clear? There are no drugs involved in your situation or anything like that that might obscure your thinking; is that correct?

Defendant Grant: Yes, sir.

The Court: Mr. Hoke, is your mind clear this morning?

Defendant Hoke: Yes.

The Court: You are feeling physically all right?

Defendant Hoke: Yes.

The Court: And you haven't any drug problem that might affect your thinking or cloud your thinking?

Defendant Hoke: No. (Tr. 33-35).

Judge Bryan, scrupulously sensitive to the problem of joint representation, and wishing to explain in unambiguous terms the significance of the decision each defendant was making, told the defendants that their decision would be irrevocable. He addressed the defendants in the following manner:

The Court: I am going to say this to each of the defendants: I want you to understand that by taking the position that you do this morning, that you want to continue with the Gallina firm representing all six of you, despite what we talked about here earlier, that you are doing this for good. You are committing yourselves now and you are never going to be able to raise this question on appeal or any other time if something develops during the trial that is unfavorable to you. You have elected to keep the Gallina firm; do you understand that?

(Defendants answered in the affirmative.)

The Court: Do you understand that when the trial is over I am not going to have people coming back to me then and saying: "I didn't like the way he represented me either." You've got to fish or cut bait for good, you understand.

(Defendants answered in the affirmative.)

The Court: I think you all understand, but I will ask each of you. Do you want to continue with the Gallina firm, Mr. Sisca?

Defendant Sisca: Yes.

The Court: Mr. Abraham, do you want to continue with the Gallina firm?

Defendant Abraham: Yes, your Honor.

The Court: Mr. Holder?

Defendant Holder: Yes, your Honor.

The Court: You want to continue with the Gallina firm?

Defendant Holder: Yes.

The Court: Mr. Grant, do you want to continue with the Gallina firm?

Defendant Grant: Yes.

The Court: Mr. Hoke, what do you say?

Defendant Hoke: Yes.

The Court: And Miss Logen?

Defendant Logen: Yes. (Tr. 35-37).

Following Judge Bryan's individual questioning of each petitioner, a brief exchange ensued between the District Court and the Assistant United States Attorney. The Assistant United States Attorney suggested the

possibility of appointing independent counsel to advise each defendant on the joint representation question. (Tr. 37-41). Judge Bryan confronted with each defendant's repeated statements in open court that he was voluntarily and knowingly retaining the same law firm as five of his co-defendants, concluded and informed the defendants that each had elected to continue with the same law firm and "the only thing I can do with such a free election is to recognize their right to make such a free choice, and I will permit them to do so." (Tr. 43).

Approximately two months after this hearing, the trial of Indictment 72 Cr. 1159 commenced on January 16, 1973. The petitioners who had been questioned individually and in detail by Judge Bryan on November 22, 1972, were represented by attorneys with the law firm of Lenefsky, Gallina, Mass, Berne and Hoffman.* The trial concluded on February 23, 1973, when the jury found the petitioners guilty of violating provisions of the federal narcotics laws.

Following the trial Judge Bryan permitted petitioners and their co-defendants to secure the suppression of evidence on grounds not advanced until the trial began. *United States* v. *Sisca*, 361 F. Supp. 735 (S.D.N.Y. 1973). On June 26, 1973, Judge Bryan sentenced Abraham, Holder, Grant, and Hoke. The petitioners' convictions were affirmed on May 10, 1974, by this Court. *United States* v. *Sisca*, 503 F.2d 1337 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974). On appeal Abraham and Grant were represented by Henry J. Boitel, Esq., who was not then and is not now a member or associate of

---

* At the trial Abraham was represented by Jeffrey Hoffman, Esq., who also represented co-defendants Logan and Grant. Sisca was represented by Mr. Gallina, Hoke by John Kiernan, Esq., and Holder by John Pollak, Esq.

the firm which represented Abraham, and the five co-defendants at trial. Lenefsky, Gallina, Mass, Berne and Hoffman were "of counsel" on the brief for Abraham and Grant. Mr. Boitel represents petitioner Grant in the instant appeal. Interestingly, none of the defendants, including Mr. Abraham or Mr. Grant, raised any question relating to joint representation, conflict of interest or ineffective assistance of counsel on the direct appeal.

On May 25, 1976, Judge Bonsal conducted an evidentiary hearing relating to the issues raised by the motions filed by Abraham and Holder. At the hearing, Abraham testified about a meeting at Mr. Gallina's office on the morning of November 22, 1972. Abraham claimed that Gallina told him and several of his co-defendants that the Government wanted to split up the defendants, that the District Judge was going to conduct a conflict of interest hearing, and "that no matter what happened or what takes place or what questions, the answer was to stay with the firm, and any answer that would keep us with the firm, those were the answers we were supposed to give." (H. Tr. 26-27).* Abraham further testified that at the time of the conflict of interest hearing on November 22, 1972, he already had his mind made up to stay with the Gallina law firm (H. Tr. 31), and regardless of what Judge Bryan said he had decided to stay with Mr. Gallina. (H. Tr. 44).

Abraham conceded that Mr. Gallina never told him that Judge Bryan was not to be trusted at the conflict of interest hearing. (H. Tr. 34). Petitioners had no reason to believe that Judge Bryan was attempting to divide the defendants in order to aid the Government.

---

* "H. Tr." refers to the May 25, 1976 hearing conducted by Judge Bonsal concerning the allegations raised by petitioners' motions.

Petitioners had no reason to be less than candid with the District Court. Moreover, despite Abraham's insistence that Gallina told him to answer the Court's questions in a manner to insure his continued representation by Gallina, Abraham conceded that at the twenty-five minute meeting among Gallina and the co-defendants, Gallina never told them the types of questions Judge Bryan was likely to ask them at the hearing. (Tr. Hearing, 44-45).

Abraham recalled a number of statements made by Judge Bryan at the hearing: (1) he recalled Judge Bryan speaking to him and each co-defendant about a conflict of interest; (2) he recalled telling Judge Bryan that he understood the problem, and that no threats or pressures had been placed on him to stay with Gallina's law firm; and (3) he recalled Judge Bryan telling him that if he stayed with the same law firm which represented his co-defendants, he could not come back after the trial, and complain about that decision. (Tr. Hearing, 34-37).*

Erroll Holder also testified about the November 22, 1972, meeting among Gallina and Holder's co-defendants prior to the joint representation hearing before Judge Bryan. Holder testified that Gallina never explained the dangers of joint representation. Instead, according to Holder, Gallina argued that it was important for the defendants to remain together and not to retain separate

---

* Abraham also testified that in the months prior to his trial, several lawyers not connected with Mr. Gallina's law firm spoke to him about possibly representing Abraham. (Tr. Hearing, 39-43). According to Abraham, however, none of these attorneys who offered to represent him ever told him it was a mistake to be represented by the same law firm as his co-defendants. (Tr. Hearing, 42).

lawyers, and regardless of what the Judge said the defendants should answer any questions so as to remain with the same law firm. (H. Tr. 48-55). Holder further testified that he did not understand what Judge Bryan meant when he said that a probability of a conflict of interest existed, and that the joint representation problem never had been adequately explained to him. (H. Tr. 56-59).

On cross examination, Holder acknowledged that his wife, Carol Holder, also had been a defendant in *United States* v. *Sisca*, Indictment 72 Cr. 1159, and that she was not represented by anyone associated with the Gallina law firm. Rather, she had been represented by Alvin Geller, Esq., the attorney who now represents Holder in the instant appeal. (H. Tr. 63). Holder denied that he ever discussed with his wife the possibility of her being represented by the Gallina law firm. (H. Tr. 64). Holder also acknowledged that Mr. Gallina never told him the specific questions that Judge Bryan was likely to ask at the joint representation hearing. Holder insisted that he was simply told to answer all questions in order to insure that he could remain with "the Gallina law firm." (H. Tr. 65-66). Holder conceded that he had no reason to question Judge Bryan's impartiality at the hearing, and he recalled that the District Court informed him that there were certain dangers in being represented by the same lawyers who represented his co-defendants, and that once he decided to remain with those lawyers he could not complain later that he was dissatisfied with that representation. (H. Tr. 68-70).

Two other witnesses testified—John Pollock, Esq., and Gino Gallina, Esq. Mr. Pollock, who represented Holder at the trial, testified that two or three days prior to the trial, he discussed the subject of joint representation and conflict of interest with Holder. Pollock recalled that

petitioners Hoke and Grant were at the meeting, and that Abraham was present for part of the meeting. Pollock told Holder, Hoke, Grant, and possibly Abraham that a strong conflict of interest existed among the defendants. The petitioners told Pollock that they understood the problem, but wished to continue the joint representation. (H. Tr. 77-81).*

Gino Gallina testified that he first became involved in the case of *United States* v. *Sisca* through a telephone call from Abraham's daughter (H. Tr. 106). He stated that he met with all of the defendants, including the petitioners, on a number of occasions about the conflict of interest issue, and he specifically recalled discussing the problem with Abraham prior to the hearing before Judge Bryan. (H. Tr. 107-109). Mr. Gallina explained to Abraham that arguably a conflict of interest existed, but he could waive the conflict problem if that was in his interest. (H. Tr. 109). Gallina explained to the defendants the advantages and disadvantages of one law firm representing several defendants. He explained the possible advantage to one defendant of his testifying against another defendant, and the advantage of a joint and coordinated defense. (H. Tr. 109-110). Gallina denied giving any of the defendants specific instructions on how to answer Judge Bryan's questions. (H. Tr. 113).

Following the evidentiary hearing, Judge Bonsal filed an opinion denying petitioners' motions to vacate their sentences and to grant a new trial. (A. 87-97).** Based

---

* At the May 25, 1976, hearing before Judge Bonsal, Holder was asked if he recalled his attorney, John Pollock, explaining to him the problems of joint representation and conflict of interest. Holder responded "[h]e might have. I can't really recall." (Tr. Hearing, 65).

** "A" refers to the separate "Joint Appendix."

on a careful review of the relevant precedent and the transcripts of the November 22, 1972, and May 25, 1976, hearings, Judge Bonsal reached the following conclusions: (1) Petitioners had been informed on November 22, 1972, of the conflict of interest arising from the multiple representation, and "each made a considered choice to continue with the Gallina firm as their counsel." (A. 91); (2) the District Court had followed the guidelines established by this Court in conducting a hearing to determine that each defendant including petitioners elected to continue with the same law firm; and (3) the claim of prejudice was meritless in that the decision not to file a pretrial minimization motion was a deliberate trial tactic. (A. 96-97).

ARGUMENT

POINT I

Petitioners were fully apprised of a possible conflict of interest as a result of joint representation and each elected to proceed with the multiple representation.

Petitioners claim that the November 22, 1972, hearing in which Judge Bryan questioned each defendant on four separate occasions did not constitute an adequate waiver of each defendant's right to separate representation. A review of the transcript from that hearing and the relevant precedent shows that this contention is utterly without merit.

It is well settled in this Circuit that when the Court becomes aware of a potential conflict of interest because of dual representation, the trial judge should conduct a hearing to determine whether a conflict of interest exists

and, through individual questioning of each defendant, whether the defendant, after being made aware of the possibility of a conflict, has any objection to the joint representation. *United States* v. *Carrigan*, — F.2d —, Dkt. No. 74-2056, slip op., 392 (2d Cir., November 3, 1976); *United States* v. *Mari*, 526 F.2d 117, 119 (2d Cir. 1975); *United States* v. *DeBerry*, 487 F.2d 448, 453-54 (2d Cir. 1973); *United States* v. *Alberti*, 470 F.2d 878, 881 (2d Cir. 1972), *cert. denied*, 411 U.S. 919 (1973). Such a procedure is necessary to insure that a defendant understands his right to representation that is immune from conflicting interests or divided loyalties. See *Glasser* v. *United States*, 315 U.S. 60 (1942). The trial judge should be satisfied that each defendant "understands clearly the possibilities of a conflict of interest and waives any rights in connection with it." *United States* v. *DeBerry*, *supra*, 487 F.2d at 454.

The hearing conducted by Judge Bryan met the standards established by the Second Circuit in cases decided prior to and after the date of the joint representation hearing, and indeed was a model of the procedures District Courts should follow in such circumstances. Prior to individually interrogating each defendant, Judge Bryan told the defendants "the Court will have some remarks to make to them individually and collectively during the course of the proceedings this morning, but I am cautioning the six defendants to pay very close attention to what is said this morning because it may vitally affect their interests in this case." (Tr. 3). A trial judge could not be more explicit in informing defendants of the importance of the joint representation proceeding. Indeed, Judge Byran emphasized this point with particular force and clarity when after questioning each defendant, and finding that each one wanted to proceed with the dual representation, he explicitly informed them that none of them could later decide he was unhappy

with the dual representation and obtain legal redress. (Tr. 35-36). In Judge Bryan's words, each defendant "despite what we talked about here earlier," (Tr. 36), had elected to "keep the Gallina firm," (Tr. 36) and each must understand the consequences of that decision.

This is not a case where the District Judge simply relied on the assurances of counsel that no conflict of interest existed or that counsel had discussed the problem with his clients and each wished to continue the joint representation. See *United States* v. *DeBerry*, *supra*, 487 F.2d at 453; *United States* v. *Lovano*, 420 F.2d 769, 773 (2d Cir.), *cert. denied*, 397 U.S. 1071 (1970). Upon being informed of a potential conflict of interest, Judge Bryan immediately decided not to rely simply on the assurances of defense counsel but to question each defendant. (Tr. 11).

Judge Bryan explained to each defendant the serious charges pending against him, the probability of a conflict of interest, and the right of each defendant to separate counsel. In judging the adequacy of the hearing, we emphasize that Judge Bryan questioned each of the six defendants in the presence of the co-defendants. Not only did Abraham, Holder, Hoke, and Grant have the benefit of Judge Bryan's individually addressing each of them, but each had the opportunity to hear Judge Bryan reiterate his comments six times. Thus, when Judge Bryan informed Sisca that it is difficult for an attorney who represents several defendants to ask certain questions which may hurt one defendant and not another, (Tr. 23), each petitioner heard that admonition.*

* Indeed, Judge Bryan asked Abraham if he had heard what the Court had said to Sisca, and Abraham responded in the affirmative. (Tr. 25). The District Judge asked Holder if he had heard what the Court had said to Sisca and Abraham, and Holder responded "yes." (Tr. 27). Grant also agreed that he had heard "everything that has been said in the courtroom" (Tr. 28), as did Hoke. (Tr. 29).

Petitioners now complain that they were unaware of the conflict of interest, and did not comprehend Judge Bryan's statements to them. Such a claim is obviously the result of a defendant convicted of a serious offense who retrospectively believes he may have erred in his choice of attorneys or is desperately searching for any means of undoing his well-merited conviction.*

The statements made by Judge Bryan to each defendant were unambiguous, even to a layman. It is simply impossible to credit Abraham's contention that he didn't understand Judge Bryan's clear warning that "[t]here is the possibility of a situation developing during the trial in which the best protection of your interests may be different from the protection of the interests of one or more of your co-defendants who is represented by the same counsel." (Tr. 25). Holder cannot seriously argue that he did not understand Judge Bryan's remarks to him that "perhaps even a probability that conflict of interest will develop and that your interests on the trial may be different from the interests of some of your co-defendants and that it might be that counsel is forced to take a position which is more favorable to another defendant than it is to you." (Tr. 27). Nor should this Court seriously doubt that Grant understood Judge Bryan's lucidly phrased statement to him "that at some point or points during the course of the proceedings the Gallina firm may be in a position where they have to do something that would help one defendant and perhaps hurt you somewhat. . ." (Tr. 29). Finally,

---

* The first time *any* claim of conflict of interest was ever raised was more than three years after conviction. As this Court has noted, a District Court need not credit a belated claim nor need it ever hold a hearing to test its veracity. *Seiller* v. *United States*, — F.2d —, Dkt. No. 75-2002, slip op. 6509, 6536 (2d Cir., Dec. 1, 1975).

Hoke, even as a lay person, understood the plain thrust of Judge Bryan's comment to him that "there may come a time possibly or perhaps even probably the Gallina firm with all good faith would have to take a position that may be unfavorable to you, might prejudice you and favor one of the other defendants they represent." (Tr. 30).

We have found no case in this Court where a new trial has been ordered because co-defendants were represented by the same attorney, when the trial court conducted a hearing into the joint representation issue, and personally interrogated the individual defendants. In *United States* v. *Carrigan, supra*, — F.2d at —, Dkt. No. 74-2056, slip op. 392-97, *United States* v. *De Berry, supra*, 487 F.2d at 452-54 and *United States* v. *Olsen*, 453 F.2d 612 (2d Cir. 1972) this Court ordered new trials where co-defendants were represented by the same attorney, and each defendant may have been prejudiced by the dual representation.* In *Carrigan* and apparently *Olsen* the trial court made no inquiry of either defendant or counsel, and in *DeBerry* the trial judge failed to interrogate the individual defendants.

As we have previously pointed out, Judge Bryan did interrogate each defendant at length, explaining to each quite clearly the perilous path each might be taking by accepting multiple representation.** Indeed, the lan-

---

* As this Court has emphasized, "The mere representation of two or more defendants by a single attorney, does not automatically give rise to a constitutional depravation of counsel. *United States* v. *Carrigtan, supra*, slip op. 392; *United States* v. *Vowteras*, 500 F.2d 1210, 1211 (2d Cir.), cert denied, 419 U.S. 1069 (1974).

** *Morgan* v. *United States*, 396 F.2d 110 (2d Cir. 1968), is another instance where this Court remanded a case to the district court because of its concern that joint representation may

[Footnote continued on following page]

guage used by this Court in *United States* v. *Wisniewski*, 478 F.2d 274, 281 (2d Cir. 1973) to describe the efforts of the trial judge in handling the joint representation problem applies with equal validity to Judge Bryan's efforts in the instant case:

> We are not here dealing with negligence on the part of the trial judge or defense counsel in failing to inquire into the possibility of a conflict of interest. On the contrary, from the very outset both the court and the government evidenced a keen sensitivity to the subject and repeatedly sought to ferret out from the defendants and their retained common counsel whether there were facts or separate defenses indicating the necessity for separate representation.

We submit that the inquiry conducted by Judge Bryan was even more detailed and probing than the hearing sanctioned by this Court in *United States* v. *Wisniewski*. In *Wisniewski*, this Court affirmed the conviction where the attorney informed the Court in the defendants' presence that on several occasions he had told the defendants of a possible conflict of interest and that they had a right to counsel of their choosing whether privately retained or court-appointed. The trial judge then in-

---

have denied defendants effective assistance of counsel. There the Court remanded a denial of a habeas corpus petition with instructions that the conviction could stand if the district court determined that no conflict of interest existed in the presentation of the defenses by the same attorney or that any conflict was so minimal that it could not have affected the result. If the district court found that a conflict of interest existed so as to prejudice the defendant, then the case should be retried. It is evident from the Court's opinion that unlike the situation in the instant appeal, no individual interrogation of each defendant had occurred either prior to or during the trial.

dividually asked the defendants whether they understood what the defense attorney had said and whether they still wanted him as their attorney. Each defendant individually answered in the affirmative. This Court rejected the claim of ineffective assistance, despite prejudice suffered by one of the defendants, since "both the existence and the significance of any possible conflict of interest between himself and the other defendants, had one existed, should have been apparent to him, especially after his attention was repeatedly drawn to the possibility of conflict." *United States* v. *Wisniewski*, *supra*, 478 F.2d at 283-284.*

Since Judge Bryan's hearing was clearly adequate to insure that the defendants had been apprised of the possibility of a conflict of interest, and still elected to proceed with the joint representation, petitioners seem to argue that Judge Bryan should have required them to retain separate counsel. That position is simply not the law in this Circuit. Indeed, in view of the strong policy permitting a defendant to be represented by counsel of

---

* The inquiries conducted in *Wisniewski*, quoted at 478 F.2d at 282-283. fnn. 7-9, were considerably less specific than those in the hearing before Judge Bryan. Judge Bryan directly advised the defendants or called their attention to statements made by others regarding such opportunities for conflict of interest where it might be more advantageous for some defendants to take the stand than others. (Tr. 41); and where common counsel might be reluctant to call attention to the weakness of proof against a particular defendant. (Tr. 10, 23-24). All of the defendants heard the Assistant United States Attorney state that the strength of the government's case varied among the defendants (Tr. 10), and Judge Bryan called attention to these comments when he began questioning the defendants individually. (Tr. 24). Judge Bryan repeatedly emphasized to the defendants that the common attorneys might have to take certain positions at trial which will hurt one defendant in order to help another. (Tr. 23, 25, 27, 29, 30).

his choice, undoubtedly petitioners would now be seeking a new trial on the grounds that the trial judge had unduly interferred with their right to counsel if Judge Bryan had required each defendant, over that defendant's objection, to seek different representation. See *United States* v. *Wisniewski*, *supra*, 478 F.2d at 285; *United States* v. *Sheiner*, 410 F.2d 337, 342 (2d Cir.), *cert. denied*, 396 U.S. 825 (1969); *cf. Faretta* v. *California*, 422 U.S. 806 (1975); *U.S. ex rel Davis* v. *McMann*, 386 F.2d 611 (2d Cir. 1967), *cert. denied*, 390 U.S. 958 (1968).* It is difficult to imagine what else Judge Bryan could have done other than to permit the petitioners to be represented by the same law firm as their co-defendants. A defendant may insist upon joint counsel of his own selection even where the conflict of interest is apparent and not at all speculative or remote.

The facts and decision in *United States* v. *Armedo-Sarmiento*, 524 F.2d 591 (2d Cir. 1975), are particularly instructive on this point. In *Armedo-Sarmiento*, the trial judge had disqualified counsel for two defendants because that law firm had previously represented three individuals whom the Government planned to use as witnesses. The witnesses were unwilling to waive the attorney-client privilege regarding communications with their previous lawyers who now represented the two defendants. Thus, the lawyers were disqualified because they could not effectively cross examine the potential Government witnesses, for fear of violating the attorney client privilege. This Court reversed the trial court's disqualification order because the District Court did not give sufficient weight to the defendant's rights. The Court explicitly recognized

---

* In *United States* v. *Sheiner*, *supra*, 410 F.2d at 342 this Court opined that "defendants who retain counsel also have a right of constitutional dimension to representation by counsel of their own choice . . ."

that the defense counsel's conflict of interest may impair his ability effectively to assist his client in cross examining the Government witnesses who had been represented by the same lawyers who now represented the defendants. However, the defendants must be given the opportunity to elect to proceed with these lawyers "and to thereby make a knowing and intelligent waiver of any claims which might arise from their attorneys' conflict of interests." *Armedo-Sarmiento, supra,* 524 F.2d at 593.

If a defendant's right to proceed with counsel of his own choice is so compelling and paramount that he can do so despite the inability of that lawyer to cross examine effectively important Government witnesses, then Abraham, Holder, Grant and Hoke could properly waive their rights when the difficulties presented by the conflict were vastly more speculative. To permit trial courts to allow defendants to insist upon joint representation and then to allow them to return to court at a later date when their joint representation strategy fails is to place trial judges in an absolutely untenable position. Judge Mansfield aptly stated in *United States* v. *Wisniewski, supra,* 478 F.2d at 285 in words peculiarly appropriate to this case:

> "To permit a *post hoc* judicial inquiry into earlier privileged attorney-client communications whenever a defendant seeks to set aside his conviction on grounds of conflict of interest on the part of his lawyer would be virtually to outlaw joint representation, since the temptation to attack his counsel's unsuccessful strategy would be too great for the disappointed client to resist, particularly when he stood to lose nothing by launching the attack."

The District Court can do no more than satisfy itself that a defendant is aware of the conflict of interest pos-

sibility and is knowingly waiving his right to separate counsel. Granting a new trial in the instant case would encourage defendants who make the strategic choice to participate in a joint and coordinated defense to attack collaterally that decision when the stratagem fails and the defendant is convicted. These petitioners selected the strategy of a joint defense with all the advantages and disadvantages attendant to that decision. The dangers of that decision were adequately explained to them and they cannot complain simply because they now believe they chose unwisely.

POINT II

Petitioners were not prejudiced by the joint representation.

Petitioners claim that each suffered a specific instance of prejudice because of the joint representation. This contention is without merit.

In several cases this Court has affirmed criminal convictions where the accused were represented by the same counsel despite the absence of any individual interrogation by the trial judge of each defendant. See *United States* v. *Alberti*, *supra*, 470 F.2d at 880-81; *United States* v. *Lovano*, *supra*, 420 F.2d at 773-74.* In those

---

* In *United States* v. *Olsen*, *supra*, 453 F.2d 612, discussed *supra* at 25, this Court reversed the conviction of one defendant who was able to show a specific prejudice caused by his representation by the same attorney who represented his two co-defendants. The Court, however, affirmed the convictions of the two co-defendants despite the failure of the trial court to make inquiry of them concerning the dual representation because these two co-defendants could not show that the joint representation resulted in any prejudice to them. See also *United States* v. *Wisniewski*, *supra*, 478 F.2d at 281.

cases the defendants were not entitled to any relief because they had failed to demonstrate "some specific instance of prejudice, some real conflict of interest," resulting from the joint representation. Rather, "[i]t is settled in this Circuit that some specific instance of prejudice, some real conflict of interest, resulting from a joint representation must be shown to exist before it can be said that an appellant has been denied the effective assistance of counsel." *United States* v. *Carrigan*, *supra*, slip op. 393.

In order to overcome this hurdle, the petitioners have ingeniously created a highly speculative scenario to prove the specific instance of prejudice they must show in order to secure post conviction relief. They apparently claim to have suffered prejudice due to the failure of their attorneys to file a timely minimization motion. They argue that this evidenced a greater concern for co-defendant Sisca's interests to the detriment of their interests.*

Judge Bonsal in denying these petitions found no merit in the claims of prejudice; he concluded "that the decision not to file a pre-trial minimization motion was a deliberate trial tactic . . ." (A. 97). This Court in affirming the petitioners' and their co-defendants' convictions in this case characterized the decision to defer filing of the minimization motions until after the trial commenced as "deliberate trial strategy" and as "deliberate and subtly disruptive tactic[s]". *United States* v. *Sisca*, *supra*, 503 F.2d at 1346-49. Apparently the lawyers may have made a strategic decision to file the motion at a time when the Government could not appeal from an adverse

---

* It is, we submit, impossible to conceive how Sisca was any less prejudiced than Abraham, Holder, Grant, or Hoke by the failure to file the minimization motion prior to trial.

ruling. All defendants, including Abraham, Holder, Grant, and Hoke, would have benefited from such a decision, if the tactic had worked; all equally suffered when that strategic judgment to file tardy papers backfired.

Petitioners advance the fanciful notion that since Sisca had available experts to express their opinions that the jury should reject the positive identification testimony that Sisca's voice was on the taped conversations, he gained more than the co-defendants in filing the minimization motion after jeopardy had attached. In view of the fact that the major part of the Government's case against Sisca were the intercepted conversations, this argument makes no sense. This Court in affirming Sisca's conviction stated that "[t]he principal evidence of Sisca's participation in the conspiracy were eight intercepted telephone conversations with Abraham, Castalazzo, and Logan, and his presence at, and flight from, a furtive nighttime meeting with Abraham on December 13." *United States* v. *Sisca*, *supra*, 503 F.2d at 1344. Thus, Sisca had a substantial amount to gain by securing an order or ruling suppressing the wire intercepts. He and his co-defendants all suffered when the tactical ploy to delay the minimization motion failed.*

---

* The *non-electronic* surveillance testimony against the petitioners included the following: Surveillance testimony against Abraham, Grant and Hoke. A search of Hoke's house revealed heroin, an attache case in one room with $39,000 in cash, an attache case in another room with $20,130 in cash, a rifle and several revolvers near the heroin, a scale and plastic bagging equipment, and several thousand glassine envelopes. Grant and Abraham were arrested with large quantities of heroin. A search of Grant's home revealed a quantity of adulterants. Approximately $16,000 in cash was found at Holder's residence. Abraham also admitted after his arrest that he had that morning purchased heroin worth more than $170,000, and that he had

[Footnote continued on following page]

POINT III

Grant's petition raised the identical claims as Abraham's and Holder's and there was no need to conduct a new evidentiary hearing.

Grant also claims that his case should be remanded to the District Court for a hearing. Grant as well as Hoke filed his petition *pro se* after the District Court held the evidentiary hearing. Judge Bonsal in denying the petitioners' motions in a written opinion stated:

> Since the court finds the evidence produced at the May 25, 1976 hearing is applicable to the issues raised in the Hoke and Grant motions, a new evidentiary hearing will not be ordered and all four motions will be considered together. (J.A. 90).

The decision of Judge Bonsal not to hold a new hearing was eminently sound. The issues raised by Grant were identical to those raised by Holder and Abraham. Grant claims that he was prejudiced by the dual representation, and that the November 22, 1972, hearing constituted an inadequate waiver of his right to single representation. This is precisely the same claim advanced by Holder and Abraham. Indeed, the papers filed by Grant *pro se* were identical to the papers filed

---

been making large purchases and subsequent redistributions on a bi-weekly basis for two and one-half years. As this Court observed in *United States* v. *Sisca*, *supra*, 503 F.2d at 1345-46: "Electronic and visual surveillance provided impressive documentation of a continuing distribution relationship between Abraham as a major wholesale supplier and such lower level wholesale and major retail operatives as Logan, Brown, Grant, Hoke, Coombs, and Holder, and through the latter, with Carol Holder, Ellington and McBride."

by Holder's attorney, with the exception of substituting the name Grant for Holder. (Compare Grant App. 3-15 with Holder App. SA-23-SA-35). Moreover, no affidavit was filed by Grant with the District Court alleging any additional facts.

Thus, regardless of what Grant may testify to at an evidentiary hearing, he would not be entitled to any relief. As we have demonstrated, the November 22, 1972, hearing constituted an election by Grant, and his five co-defendants to continue with the dual representation. The possibility of a conflict of interest was explained adequately to Grant, and he elected to follow that potentially perilous path. Even if Grant were now to contend that prior to the November 22, 1972, hearing he had decided to stay with the Gallina law firm, he would not be entitled to any relief.

By presiding over the hearing on Abraham and Holder's petitions Judge Bonsal was fully prepared to dispose of the identical issues raised by Grant and Hoke. This Court has previously observed that in deciding a question as to the propriety of a District Court's failure to conduct a hearing pursuant to a habeas corpus petition, weight should be given to that district judge's prior exposure to the case. *United States* v. *Franzese*, 525 F.2d 27, 32 (2d Cir. 1975). Similarly we suggest that Judge Bonsal's presiding at one evidentiary hearing raising the identical issues as that posed by Grant, is sufficient to permit him to dispose of Grant's petition without holding an additional hearing. The decision to decide all four motions together was well grounded in law and common sense, and as Justice Stewart remarked in *Machibroda* v. *United States*, 368 U.S. 487, 495 (1962), "The language of the statute [§ 2255] does not strip the district courts of all discretion to exercise their common sense." (quoted

by Judge Friendly in *United States* v. *Franzese*, *supra*, 525 F.2d at 32).*

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

RICHARD WEINBERG,
FREDERICK T. DAVIS,
Assistant United States Attorneys,
Of Counsel.

---

* Grant also claims he was deprived of effective assistance of counsel from the time of the conflict of interest hearing and the trial. Since this claim was not advanced below, it cannot be raised for the first time on appeal. See *Egger* v. *United States*, 509 F.2d 745 (9th Cir.), *cert. denied*, 423 U.S. 842 (1975) *United States* v. *Haywood*, 464 F.2d 756 (D.C. Cir. 1972), *Hudson* v. *United States*, 429 F.2d 1311 (5th Cir. 1970), *cert. denied*, 402 U.S. 965 (1971).

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Richard Weinberg being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 23rd day of December, 1976, he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

1) Alvin Geller, Esq.
Geller & Cohen
299 Broadway
New York, New York 10007

2) Henry J. Beitel, Esq.
233 Broadway
New York, New York 10007

3) William C. Chance, Esq.
2364 Akam Clayton Powell Jr. Blvd.
New York, New York 10030

4) Allan Mo Palmer, Esq.
1707 N Street, N.W.
Washington, D.C. 20036

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Richard Weinberg

Sworn to before me this
23rd day of December, 1976.

Lawrence Farkash

LAWRENCE FARKASH
Notary Public, New York State
No. 24-4606580
Qualified in Kings County
Comm. Expires March 30, 1977